Supreme Court, U.S.
FILED

No. 98- 98 270 AUG 11 1999

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL T. COLLINS,

Petitioner,

v.

MONTGOMERY COUNTY BOARD OF PRISON INSPECTORS; JOSEPH WALSH, individually; JAMES A. FREY, individually; EDWIN NEGRON, individually; ALFRED RICCI, individually; MARK GRIFFITH, individually; FRANK GRIFFITH, individually; DAVID DOMBROSKI, individually; JULIO M. ALGARIN, in his official capacity and individually; DELORES MARTIN, individually; LAWRENCE ROTH, in his official capacity; and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the equal protection component of the Fifth Amendment Due Process Clause permit Congress to deny to prisoners who prevail in civil rights actions the reasonable attorney's fee to which all other prevailing civil rights litigants are statutorily entitled, where the denial is not a rational means to any legitimate end because the fee restrictions, which apply to meritorious claims only, cannot conceivably discourage prisoners from filing frivolous suits and because prisoner status is not related to any other conceivable purpose of the fee restrictions?

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Michael T. Collins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 3a) is reported at 176 F.3d 679. The opinion of the district court (App., *infra,* 15a) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, which embodies the principle of equal protection of the laws, provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The relevant provisions of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (codified at 42 U.S.C. § 1997e(d)), are reproduced at App., *infra,* 32a.

STATEMENT

This case raises the important question of whether section 803(d) of the Prison Litigation Reform Act, which treats prisoners differently and worse than all other prevailing civil rights litigants for purposes of awarding attorney's fees, violates the principle of equal protection of the laws by discriminating against prisoners for no legitimate purpose.

A. History of the Case

On June 28, 1995, petitioner Michael T. Collins, while handcuffed and in the custody of a county prison in Montgomery County, Pennsylvania, was attacked and repeatedly bitten by a trained police dog on the command of one correctional officer, and was thrown to the ground by other correctional officers. Collins filed a civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Pennsylvania, and moved for appointment of counsel. The district court asked a lawyer with the Philadelphia law firm of Pepper, Hamilton & Scheetz (now Pepper Hamilton LLP) to represent Collins in several civil rights actions he had filed. Upon his review of the cases, the lawyer declined the district court's request with respect to two of Collins' actions, but accepted the appointment to represent Collins in his action based on the June 28, 1995 police dog attack.

The case was tried to a jury, which returned a verdict on December 16, 1996 against two of the correctional officer defendants, and awarded compensatory damages of $15,000 and punitive damages totaling $5,000. Respondents did not appeal this verdict. As a prevailing civil rights litigant, Collins moved for an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. Collins sought attorney's fees of $80,122, based on the standard hourly rates of $180 and $95, respectively, for the two associates who handled the pretrial proceedings and who tried the case.

In support of his fee petition, Collins addressed the effect of the attorney's fees provisions of section 803(d) of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (codified at 42 U.S.C. § 1997e(d)) ("PLRA" or the "Act"),

which became effective on April 26, 1996, during the pretrial proceedings in the district court. The PLRA limits the amount of attorney's fees recoverable by prisoners who prevail in civil rights actions in two ways: by capping the attorney's hourly rate at 150% of the rates payable to appointed counsel in criminal cases under the Criminal Justice Act, 18 U.S.C. § 3006A ("CJA"); and by capping fees at 150% of the amount of the money judgment in suits for damages. In addition, the PLRA requires that a portion of any money judgment recovered by a prisoner, not to exceed 25%, be applied to the satisfaction of attorney's fees.

Collins argued that application of these fee restrictions to cases pending on the PLRA's effective date would constitute an impermissible retroactive application of new law,[1] or, if the provisions were held to apply, that the fee restrictions violate the equal protection component of the Fifth Amendment by irrationally denying only one class of successful civil rights litigants—prisoners—the opportunity to recover reasonable attorney's fees incurred in vindicating their constitutional rights.

Respondents opposed the fee petition in part. They agreed that the PLRA would be impermissibly retroactive if applied to work performed before the Act's effective date, but argued that the fee restrictions are not retroactive as applied to post-enactment work performed in cases pending on the Act's effective date, and that the fee restrictions do not deprive prisoners of equal protection of the laws. The United

1. This Court recently ruled that section 803(d)(3) of the PLRA, which caps the hourly rate at which attorney's fees are compensable, applies in cases pending on the Act's effective date to services performed after the effective date but not to services performed before the effective date. *See Martin v. Hadix*, ___ U.S. ___, 119 S. Ct. 1998 (1999). In reaching the conclusion that application of the PLRA's fee restrictions to post-enactment services would have no impermissible retroactive effect, the *Hadix* Court assumed that counsel was free to withdraw from the representation upon the enactment of the PLRA. *See id.* at 2007. This case is distinguishable from *Hadix* in that the district court below stated on the record that it would not have permitted counsel to withdraw from their representation of Collins based on the enactment of the PLRA's fee restrictions. Petitioner does not, however, seek certiorari on the retroactivity issue.

States intervened to defend the constitutionality of the PLRA, and took the same legal positions as respondents.

B. The District Court's Decision

The district court held that applying the PLRA's fee restrictions to post-enactment legal services does not have an impermissible retroactive effect. *See* App., *infra,* 23a-24a. With respect to Collins' equal protection argument, the district court applied rational basis review and hypothesized, in the absence of any explicit statement of congressional purpose—either on the face of the Act or in the legislative history—two interests that the court thought conceivably could support the classification drawn by the PLRA's attorney's fees restrictions: the discouragement of frivolous prisoner suits and appeals; and the achievement of uniformity in the fees earned by court-appointed attorneys in civil and criminal cases. *See* App., *infra,* 26a-27a.

At the district court's direction, Collins' counsel submitted a revised fee petition, which applied the hourly rate restriction of the PLRA. In the Eastern District of Pennsylvania, these rates calculate to $97.50 for in-court time and $67.50 for out-of-court time. This rate adjustment reduced the maximum fees recoverable for counsel's post-enactment work from $72,333.00 to $30,025.30. *See* App., *infra,* 6a.

Applying the provisions limiting attorney's fees to 150% of the judgment and requiring that a portion of the judgment be applied to satisfy the attorney's fee, the district court further reduced the recoverable attorney's fee to $30,000, and required Collins to contribute $750 (2.5% of the judgment), leaving respondents liable for the $29,250 balance. *See* App., *infra,* 6a.

C. The Court of Appeals' Decision

Collins filed a timely appeal of the district court's order ruling on his fee petition, and the case was argued before a panel of the United States Court of Appeals for the Third Circuit on November 17, 1998. Without issuing a panel opinion, the full court of appeals voted to rehear the case *en banc,* which argument took place on April 23, 1999. *See* App., *infra,* 1a.

In a May 13, 1999 opinion, the twelve judges of the court of appeals agreed that neither of the fee restrictions has an impermissible retroactive effect as to work performed after enactment of the PLRA, but that the provision requiring the prevailing plaintiff to pay up to 25% of the judgment toward satisfaction of attorney's fees is impermissibly retroactive. *See* App., *infra,* 11a-13a. The same twelve judges divided evenly as to whether the judgment-based cap on attorney's fees deprives prisoners of the equal protection of the laws. *See* App., *infra,* 13a-14a. The even split in the court of appeals had the effect of affirming the judgment of the district court in all respects, except as to that portion of the judgment requiring Collins to pay $750 of the judgment toward satisfaction of attorney's fees.[2]

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional practical and legal importance that will arise in every case in which a represented prisoner prevails on a civil rights claim. The result below—an evenly divided *en banc* court of appeals—portends the inevitable disharmony that will result in the absence of the immediate, authoritative treatment of this Court.

The practical importance of the question presented could hardly be greater. Not only is the question sure to be a perennial one requiring the treatment of the lower courts, so long as the PLRA's fee restrictions stand, district courts and prisoners with meritorious civil rights claims will find it difficult to enlist the aid of lawyers in presenting such claims.

If the PLRA's fee restrictions were constitutional, these consequences, however undesirable, would have to be endured. However, as six judges of the court of appeals recog-

2. The court of appeals found it unnecessary to consider the constitutionality of the hourly rate cap because, of the two caps, the judgment-based cap, when applied in this case, requires the steeper reduction in fees (albeit the difference, by sheer coincidence, is only $25.30). *See* App., *infra* 14a. As the invalidation of the hourly rate cap would not have enhanced the post-enactment attorney's fees beyond the $30,000 allowable under the judgment-based cap, the court found no occasion to decide the hourly rate cap's constitutionality.

nized, at least the judgment-based fee cap is unconstitutional because treating prisoners differently and worse for the purpose of awarding attorney's fees is not rationally related to any legitimate government interest. Moreover, the decisions below upholding the constitutionality of the fee restrictions are, in fact, inconsistent with decisions of this Court striking down irrational legislative discriminations against prisoners[3] and indigent criminal defendants.[4] As discussed in Part III of this petition, the decisions below are also inconsistent with this Court's precedents mandating by example the non-acceptance of attenuated rationales for legislative classifications that burden the constitutionally-sensitive interests of unpopular or marginalized classes.

That twelve judges of the court of appeals could not resolve the equal protection question presented by the PLRA's fee restrictions is powerful proof that confusion reigns in this area of constitutional jurisprudence, and that the lower federal courts will benefit from this Court's immediate treatment of the question presented. Because this case involves a federal rather than a state statute, it is a particularly suitable vehicle for clarifying the application of equal protection principles, as it is uncomplicated by considerations of federalism and the respect to be accorded the efforts of states in devising solutions to their own social and economic problems.[5]

I. The Question Presented is of Great Practical Importance

By ordering rehearing *en banc,* the court of appeals recognized the question presented as one of "exceptional importance." *See* Fed. R. App. P. 35(a). The court of appeals was correct in recognizing the importance of determining the constitutionality of the PLRA's fee restrictions. By eliminating any prospect of an award of reasonable attorney's fees, the PLRA's fee restrictions sharply reduce, if they do not extin-

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3. *See Rinaldi v. Yeager,* 384 U.S. 305 (1966); *Baxstrom v. Herold,* 383 U.S. 107 (1966).

4. *See James v. Strange,* 407 U.S. 128 (1972).

5. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 40 (1973) (highest deference is due classifications drawn by state in furtherance of raising and disbursing tax revenues).

guish entirely, the incentive of lawyers to accept court appointments to represent prisoners who have meritorious civil rights claims. Without lawyers, those prisoners with non-frivolous claims—and the lower federal courts that must administer and adjudicate those claims—will be hurt severely in ways surely not intended by Congress. If the fee restrictions stand, civil rights law enforcement on behalf of prisoners—a class that includes persons awaiting trial in jail as well as persons convicted of crimes—will be crippled. By removing the incentive for lawyers to prosecute meritorious prisoner claims, such claims either will never be brought or will not be prosecuted effectively. In either case, meritorious claims will go unprosecuted, and lawless correctional officers will go unpunished and undeterred. Whatever shield the Constitution now provides for the protection of prisoners from official oppression will effectively be stripped away.

If, and for so long as, the fee restrictions stand, they will exact a second heavy cost: impaired functioning of the lower federal courts. Instead of diminishing the burden on the courts of prisoner civil rights litigation, the PLRA's fee restrictions exacerbate that burden by depriving judges of lawyers' services in cases involving claims that by definition are meritorious, and therefore not immediately dismissible.[6] Without counsel appearing on the prisoner's behalf, these cases will be infinitely more difficult for district courts to administer, to settle, or to try. Lost to the court will be the myriad services that only a trained lawyer can provide—filtering out problematic suits as a result of investigating the facts and researching the law; submitting intelligible pleadings and coherent discovery; taking depositions; making and responding to dispositive and other motions; negotiating settlement; drafting jury instructions; presenting evidence at trial; objecting to improper questions or argument; and arguing the facts to the jury and the law to the court.

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6. *See, e.g., Parham v. Johnson*, 126 F.3d 454, 457 (3d Cir. 1997) (only claims having some merit in fact and law are eligible for appointment of counsel).

These undesirable consequences can be entirely avoided, if the Court grants this petition, because the PLRA's fee restrictions are unconstitutional in that they discriminate against prisoners for no conceivable, legitimate purpose.

II. The Decisions Below Are Incorrect Because the PLRA's Fee Restrictions Are Not Rationally Related to Any Legitimate Government Interest

A. The Statutory Basis for, and Limits on, Fee-Shifting Before the PLRA

The legal background against which the PLRA's fee restrictions were enacted can be sketched easily. After this Court ruled in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) that district courts lack the inherent power to award attorney's fees to prevailing parties, Congress promptly enacted section 1988, which gives district courts the discretion to award successful civil rights litigants "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). By that means, Congress provided an incentive to lawyers to privately enforce the civil rights laws. Fee-shifting has the further salutary effects of making the injured party whole and sharpening the sting—and thereby the deterrent value—of a judgment incurred for violating another's civil rights.

In exercising its discretion to award attorney's fees to prevailing civil rights plaintiffs, district courts are not bound by any formula, and are duty-bound to take into account the magnitude and nature of the damages awarded as well as other factors bearing on the reasonableness of a fee. *See Farrar v. Hobby,* 506 U.S. 103, 114 (1992). Well before Congress enacted the PLRA, this Court had made it clear that "[s]ection 1988 is not 'a relief act for lawyers'. . . [but rather] a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." *Id.* at 122 (O'Connor, J., concurring).

Section 1988 comes into play only if a lawyer is retained or appointed to represent the litigant and the litigant prevails. *See Kay v. Ehrler,* 499 U.S. 432, 435-38 (1991). Neither a pris-

oner nor anyone else has a right to the assistance of counsel at government expense in civil rights actions, but a district court may appoint counsel to represent an indigent plaintiff under the authority of the in forma pauperis statute, 28 U.S.C. § 1915(d). By its terms and as construed, the in forma pauperis statute empowers the court only to *request* an attorney to represent any such person unable to employ counsel. *See Mallard v. United States District Court,* 490 U.S. 296, 298 (1989).

B. The PLRA's Fee Restrictions Lack a Rational Basis in that Removing the Potential for Reasonable Attorney's Fees Will Not Deter Frivolous Suits, but Rather Will Deter Only the Representation of Prisoners With Meritorious Claims

The main thrust of the PLRA is to facilitate the termination of prospective relief in prison conditions cases. *See* 18 U.S.C. § 3626. A second set of provisions, which contains the fee restrictions at issue here, targets frivolous prisoner suits brought under section 1983 and aims to reduce the burden that the excessively large number of such cases has placed on the federal courts. Toward that end, the PLRA "contains provisions that should discourage prisoners from filing claims that are unlikely to succeed." *Crawford-El v. Britton,* 523 U.S. 574, 118 S. Ct. 1584, 1596 (1998) (enumerating the provisions meant to combat frivolous prisoner suits). These provisions, in the aggregate, have been effective in reducing the number of new section 1983 filings by prisoners. *See id.* at 1596 n.18. They have also withstood equal protection challenges.[7]

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7. *See, e.g., Rivera v. Allin,* 144 F.3d 719 (11th Cir. 1998) (upholding PLRA requirement that prisoners with history of filing frivolous suits pay full filing fee up-front); *Murray v. Dosal,* 150 F.3d 814 (8th Cir. 1998) (upholding filing fee requirement). The constitutionality of the PLRA's fee restrictions has been addressed in only one other case, *Madrid v. Gomez,* 150 F.3d 1030, 1042 (9th Cir. 1998). The *Madrid* opinion was withdrawn in the wake of *Martin v. Hadix,* presumably because it was in conflict with this Court's holding in *Hadix* that the PLRA's fee restrictions have an impermissible retroactive effect only when applied to legal work performed before the PLRA's enactment. *See Madrid v. Gomez,* Nos. 96-17277 and 97-16237, 1999 WL 454882 (9th Cir. July 7, 1999).

Although the fee restrictions are aimed at deterring frivolous prisoner suits, as a result of either malice or miscalculation, they miss the mark and strike only at meritorious lawsuits by prisoners. Again, under section 1988, attorney's fees are available only to prevailing parties—a class that, by definition, excludes parties asserting frivolous claims. The fee restrictions therefore place no cost on, or obstacle to, the filing or prosecution of frivolous section 1983 actions by prisoners. A prisoner who is motivated to file suit by the prospect of a "holiday in court," *Crawford-El*, 118 S. Ct. at 1596, cannot possibly be deterred by the potential loss of a portion of an attorney's fee that played no part in motivating the filing of suit and that, in any event, the prisoner has absolutely no chance of recovering. A prisoner pursuing a frivolous claim will likewise be undeterred from doing so by the consideration that his or her lawyer will be undercompensated or that his or her own award may be somewhat diminished. It is simply not rational to believe that a prisoner can be deterred from filing a frivolous lawsuit by taking away part of something to which the prisoner, by definition, is entitled to none of in the first place.

Insofar as the fee restrictions are aimed at discouraging lawyers from accepting appointments to handle frivolous claims, the restrictions are misguided to the point of irrationality. Whether tempted by the potential for a substantial fee or moved by a sense of professional responsibility to serve the public good, private counsel will represent only those prisoners who have meritorious claims; litigating frivolous claims gratifies neither interest. Nor will frivolous suits be graced by district courts with appointments of counsel. In the Third Circuit and elsewhere, the threshold criterion for appointment of counsel is that the indigent litigant's claim has "some merit in law and fact." *Parham v. Johnson*, 126 F.3d 454, 457 (3d Cir. 1997). District courts must first determine that a suit is potentially meritorious before they may request that a lawyer accept an appointment, and lawyers routinely apply their own criteria (as counsel for Collins did in this case) in deciding whether

the case has sufficient merit to justify the out-of-pocket expense and investment of the lawyer's most precious commodity—time.[8]

Plainly enough, the only behavior deterrable by the PLRA's fee restrictions is the provision of legal services to indigent prisoners who have meritorious claims. And there is ample reason to believe such deterrence occurs. As the lawyer who would represent a prisoner must pay the costs incident to litigation, the risk of a comparatively small judgment, which could limit the recoverable fees to an amount insufficient to cover expenses (let alone cover the lawyer's investment in time) is a potent disincentive to representing a prisoner, regardless of the merits of the claim. That deterrent is accentuated in any case in which the claimed violation involves an intangible injury to constitutional rights, such as an infringement of the right of free speech or the right to practice one's religion consistent with the interests of prison security. Without the potential for recovering more than 150% of one dollar, or some other nominal amount that might be awarded as compensatory damages, few lawyers could afford to prosecute such cases. As a result of the PLRA's restriction of attorney's fees to 150% of the judgment secured, meritorious claims will inevitably go unprosecuted or will be prosecuted *pro se,* which is virtually to assure their defeat.[9]

C. Prisoner Status Bears No Relationship to the Other Conceivable Purposes of the PLRA's Attorney's Fees Restrictions

Given the paucity of civil rights actions in which the prisoner wins, prisoner status is unrelated to the other putative government interests posited by the district court and the United States below—aligning the fees paid to appointed counsel in civil and criminal cases and lowering the cost to

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8. Certainly after *Farrar v. Hobby,* a technically meritorious but trivial claim will not recommend itself to private counsel as offering the potential for a substantial fee at the expense of the losing defendant. *See* 506 U.S. 103, 114-16 (1992).

9. *See, e.g.*, William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 624-25 (1978-79).

states and municipalities of the constitutional torts of their employees. Both of these interests would be served as well (and as little) by applying the fee restrictions to any random group of persons with meritorious civil rights claims. It is palpably arbitrary, and smacks of invidious discrimination, to treat prisoners differently and worse for the purpose of awarding attorney's fees.

Two tenets of this Court's equal protection jurisprudence were given short shrift by the courts below, and certiorari is warranted to reaffirm the vitality of those tenets. First, it is not enough that Congress was motivated by a legitimate government interest in drawing a classification that withdraws from one class of persons a benefit to which all others are entitled; the classification must be rationally related to the advancement of the stated or hypothesized government objective. Here, as demonstrated above, the PLRA's fee restrictions simply do not, and cannot, further the interest in deterring frivolous lawsuits.

The second tenet forsaken by the courts below is that the classification itself must somehow be related to the purpose of the statute, for otherwise the classification is likely to be an invidious one. As this Court cautioned in *Heller v. Doe*, 509 U.S. 312, 321 (1993), discriminatory classifications "must find some footing in the realities of the subject addressed by the legislation." If, instead of prisoners, Congress had taken the possibility of a reasonable attorney's fee in a civil rights action away from mentally retarded persons (or from women or left-handed persons), the law would still serve the purposes of aligning the fees paid to court-appointed attorneys in some civil and criminal cases, and would still lighten the cost to states and municipalities of section 1983 liability. But as there is nothing about mental retardation (or gender or left-handedness) that is rationally related to either purpose, the disparate treatment would not, and should not, be condoned.

The teaching of *Rinaldi v. Yeager*, 384 U.S. 305 (1966) is that prisoner status is no more related to the putative government interests cited by the courts below than is left-handedness. In *Rinaldi*, this Court, in an opinion by Justice

Stewart joined by all but one member of the Court, struck down a New Jersey statute that required unsuccessful prisoner appellants to reimburse the state for the cost of trial transcripts, but did not require reimbursement by unsuccessful appellants who were not incarcerated. Because the Equal Protection Clause requires that "distinctions that are drawn have 'some relevance to the purpose for which the classification is made,'" and because prisoner status bore "no relationship whatever" to any of the possible purposes of the reimbursement statute—including the deterrence of frivolous appeals—this Court struck down the classification as an "invidious discrimination." *See Rinaldi*, 384 U.S. at 309 (citation omitted). To the same effect is *Baxstrom v. Herold*, 383 U.S. 107 (1966), in which the Court invalidated a state law that denied, to prisoners only, the right to a judicial sanity hearing before involuntary civil commitment to a mental institution.

In sum, the putative government interests of aligning the fees paid to court-appointed attorneys in civil and criminal cases and conserving public resources fail as rational justifications for the PLRA's fee restrictions for the simple reason that prisoner status is unrelated to either justification. Many more non-prisoners than prisoners prevail in civil rights actions, and there is no characteristic of prisoners—save for the public opprobrium that attaches to them—that explains why the speculated interests in uniformity of fees to court-appointed counsel or conservation of public resources from depletion by the attorney's fees portions of civil rights awards should be advanced uniquely at the expense of prisoners as opposed to the expense of, say, residents of state hospitals victimized by orderlies or civilians searched or seized by police without any pretense of probable cause. In failing to require a rational relationship between prisoner status and the purposes of the PLRA's fee restrictions, the courts below acted in disregard of numerous decisions of this Court, and at such substantial cost to the sound functioning of the federal courts and to the functioning of the Constitution inside prison walls, that immediate correction by this Court is warranted.

III. There Exists Longstanding and Widespread Uncertainty, Which Only This Court Can Dispel, Concerning the Proper Application of Rational Basis Review

This case is before the Court because the courts below evidently concluded that this Court's precedents require that the PLRA's fee restrictions be upheld even though the government was unable to articulate any rational basis for treating prisoners differently and worse for purposes of awarding attorney's fees under section 1988. Nothing else can explain why the courts below upheld a law that bears no rational relation to the principal purpose offered for it by the government—deterrence of frivolous lawsuits. The error of the courts below stems from confusion about the degree of deference required by rational basis review. This case thus presents the Court an opportunity to clarify the nature of rational basis review, a subject that has perplexed courts and commentators for years.

Confusion about the rational basis test is understandable. Two competing lines of precedent applying the rational basis test have developed in this Court's jurisprudence, one sanctioning deference so complete that it virtually never requires invalidation of a law, and the other requiring at least a plausible showing of rationality. In the first line of cases, rational basis review has resulted in near-total deference to social and economic legislation, especially where classifications reflect legislative line-drawing. *See, e.g., FCC v. Beach Communications,* 508 U.S. 307 (1993) (upholding disparate treatment of certain cable television systems as an act of regulatory line-drawing); *United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 179 (1980) (upholding legislation phasing out "windfall" benefits for railroad workers, and stating that "the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration"); *Railway Express Agency, Inc. v. New York,* 336 U.S. 106 (1949) (upholding disparate treatment of certain vehicle advertisers based on potential traffic hazards); *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483 (1955) (upholding disparate treatment of optometrists and opticians based on assumed health concerns); *New Orleans v. Dukes,* 427 U.S. 297

(1976) (upholding disparate treatment of certain push-cart vendors based on presumed tourism benefits).

In the second line of cases, the Court has exhibited far less deference and has several times struck down legislation that might have been supported by a conceivable, if tenuous, rationale. In one such case, the Court expressly sanctioned a new, intermediate level of scrutiny to be applied to gender classifications. *See Craig v. Boren*, 429 U.S. 190 (1976). More often, the Court has simply engaged in a seemingly more probing inquiry into the rationality of the legislative classification. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment prohibiting all legislative, executive, and judicial action designed to protect homosexuals from discrimination); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (invalidating city's denial of a special use permit for the operation of a group home for the mentally retarded); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (invalidating statutory denial of food stamps to households containing any unrelated individuals); *Zobel v. Williams*, 457 U.S. 55 (1982) (invalidating Alaska's mineral dividend distribution plan employing durational residency requirements); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (invalidating New Mexico's tax exemption to Vietnam veterans based on duration of residency); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (invalidating denial of preferential civil service treatment to out-of-state veterans).[10]

This second line of cases is grounded in the requirement, discussed above, that there be some trait of a singled-out group—other than its social or political unpopularity—that is related to the purpose of the challenged law. These cases exemplify this Court's command that a statute is to be overturned when "the varying treatment of different groups or persons is so unrelated to the achievement of any combination

10. Although the Court has recently analyzed durational residency requirements under the Fourteenth Amendment's Privileges and Immunities Clause, *see Saenz v. Roe*, ___ U.S. ___, 119 S. Ct. 1518 (1999), *Zobel*, *Hooper*, and *Soto-Lopez* are nevertheless noteworthy for their application of a probing rational basis review.

of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley,* 440 U.S. 93, 97 (1979). The risk of irrational action is greatest—and the need for judicial intervention most acute—in the case of laws that discriminate against socially disfavored or marginalized groups. As Justice White, speaking for the Court in *Cleburne,* made clear, rational basis review requires something more than uncritical deference, particularly when there is reason to infer antipathy or animus on the part of the legislature toward a particular group: "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests." 473 U.S. at 446-47 (citation omitted).

This Court's precedents thus demonstrate that the deference due legislative classifications under rational basis review varies according to the class involved and the interests at stake. Regulatory line-drawing demands little judicial oversight; discrimination against politically disfavored groups demands more.[11] The precedents, however, give modest guidance to the lower courts about how to apply the rational basis test and, most importantly, when a discriminatory law should be invalidated for lack of a rational justification. Numerous appellate courts have recognized the seeming uncertainty in this Court's approach to rational basis review, and either have embraced a heightened version of the rational basis test or have invited the Court to clarify its precedents. *See, e.g., Pruitt v. Cheney,* 963 F.2d 1160 (9th Cir. 1992) (applying "active

11. The divergent applications of the rational basis test have been the subject of commentary for years. Individual Justices of this Court have suggested that the Court employs an unannounced fourth level of equal protection scrutiny. *See, e.g., Cleburne,* 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part) (suggesting the Court surreptitiously applies a "second order" rational basis review). Prominent commentators have termed the Court's review in cases such as *Cleburne* and *Romer* as "covertly heightened scrutiny" and "rationality review with bite." *See, respectively,* Laurence Tribe, American Constitutional Law § 16-3 (2d ed. 1988); Cass R. Sunstein, *Foreward: Leaving Things Undecided,* 110 Harv. L. Rev. 4, 78 (1996).

rational basis review" and requiring record evidence of a rational basis for discrimination against homosexuals); *Futernick v. Sumpter Township,* 78 F.3d 1051, 1057 (6th Cir. 1996) (referring to the "slightly heightened 'rational basis scrutiny' given to suspicious classifications by equal protection jurisprudence generally"); *Milner v. Apfel,* 148 F.3d 812, 817 (7th Cir. 1998) (Posner, C.J.) ("The reasoning of *Cleburne* and *Romer* does not reach as far as the present case, and we shall leave it to the Supreme Court to draw out any broader implications of their texts.").

The instant case typifies the confusion in the lower courts regarding the proper application of the rational basis test. The district court ruled the PLRA's hourly rate cap constitutional because it "may have been an attempt to bring the fees earned by prisoners' lawyers in civil actions more in line with those earned by court-appointed attorneys in criminal actions." App., *infra,* 27a. The district court posited no specific rationale for the PLRA's judgment-based cap, other than to note a general purpose of the PLRA to deter the filing of frivolous suits. *See* App., *infra,* 26a-27a. The district court did not find that prisoner status is peculiarly related to either of these purported government interests. Instead, the district court focused on the heavy burden a plaintiff bears of negating every conceivable basis for discriminatory legislation, and concluded that "Collins has not met that burden." App., *infra,* 28a. Neither the district court nor the government was ever able, however, to identify a legitimate purpose advanced by the classification at issue.

In short, this case presents the Court with an opportunity to remind the lower courts that rational basis review requires more than blind deference to Congress. The courts below required nothing more of the PLRA's fee restrictions—which hinder the vindication of prisoners' civil rights—than the modicrum of rationality that this Court has required of cable television and push-cart vendor regulations. Despite the complete absence of a rational basis for the classification at issue, such near-total deference has sanctioned invidious discrimination in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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